DEPARTM

22 CFR Parts 22 and 42

[Public Notice: 11526]

RIN 1400-AF37

Visas: Immigrant Visas

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State (Department) amends its regulation governing immigrant visa fees to allow for the exemption from immigrant visa (IV) fees for certain applicants previously denied an immigrant visa pursuant to certain Presidential Proclamations issued by the previous administration and associated technical corrections.

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Claire Kelly, Office of Visa Services, Bureau of Consular Affairs, Department of State, 600 19th St. NW, Washington, DC 20006, (202) 485-7586.

SUPPLEMENTARY INFORMATION:

I. What changes to 22 CFR 22.1, 42.71, and 42.74 does the Department make?

The Department is amending 22 CFR 22.1 and 42.71 to exempt applicants who were denied an IV under section 212(f) of the Immigration and Nationality Act (INA) on or between December 8, 2017, and January 19, 2020, due to Presidential Proclamations 9645 and 9983 (collectively, "Proc. 9645/9983") from the payment of immigrant visa fees. The Department is also correcting a typographical error in 22 CFR 22.1, Item 32(e), which should refer to 22 CFR 42.71, *not* 22 CFR 42.74, and correcting the header for § 42.71(b)(2) to specifically refer to adoptees. The Department is also correcting a formatting error in 22 CFR 42.74(a).

II. Policy Justification.

On January 20, 2021, President Biden signed Proclamation 10141, "Ending Discriminatory Bans on Entry to the United States" (Proc. 10141), which revoked Proc. 9645/9983. Among other requirements, Proc. 10141 directed the Department to create "a proposal to ensure that individuals whose immigrant visa applications were denied on the basis of the suspension and restriction on entry imposed by Proclamation 9645 or 9983 may have their applications reconsidered" and that the proposal "shall consider whether to reopen immigrant visa applications that were denied" and "whether it is necessary to charge an additional fee to process those visa applications."

An IV applicant who is the beneficiary of a valid immigration petition may submit another visa application after being refused and in most circumstances they are required to pay again the relevant application fees. With this final rule, the Department exempts from such fees only those IV applicants who are applying again after being refused an IV pursuant to Proc. 9645/9983, with that limitation on scope being justified by the President's findings articulated in Proc. 10141, as described below. Many IV applicants denied under Proc. 9645/9983, assuming no material change in circumstances, may now be eligible for a visa, and the Department is exempting this defined category of IV applicants from payment of IV fees if they apply again for an immigrant visa.

Some applicants were initially denied IVs under the Proc. 9645/9983 and additional refusal grounds. These applicants are not eligible for the fee exemption established by this final rule, unless a consular officer has previously determined, and informed the applicant in a visa denial letter, that the refusal on other grounds has been overcome and the only impediment to issuance of an IV on January 20, 2021, was Proc. 9645/9983, as reflected in a denial under section 212(f) of the INA, 8 U.S.C. 1182(f). If the other refusal grounds have not been overcome, the applicant will be required to pay the IV fees if they wish to apply again for an immigrant visa.

This final rule also does not apply to IV applicants who were refused due to Proc. 9645/9983 on or after January 20, 2020, as 22 CFR 42.81(e) provides for the reconsideration of their previously filed application, without an additional application fee. That regulation allows IV applicants to have their case reconsidered, without payment of an additional fee, by providing "further evidence tending to overcome the ground of ineligibility on which the refusal was based" within one year of the date of refusal. The Department considers Proc. 10141, issued January 20, 2021, as the presentation of evidence overcoming the ineligibility, thus allowing cases refused within the prior year to be reconsidered under 22 CFR 42.81(e) without a new application fee.

Proc. 10141 described Proc. 9645/9983 as "just plain wrong." As a means of remedying a suspension of entry under Proc. 9645/9983 that the President found objectional as explained in Proc. 10141, the Department exempts, from payment of immigrant visa fees, applicants who were denied an IV on or between December 8, 2017, and January 19, 2020, solely due to the Proc. 9645/9983 and who submits a new application for an immigrant visa. Specifically, under this rule, these individuals would be exempt from the applicable immigrant visa application processing fee, as well as the affidavit of support review fee, if the applicant would otherwise be required to pay that fee again.

III. Regulatory Findings and Impact Statements.

A. Administrative Procedure Act

This rule is exempt from notice and comment under the Administrative Procedure Act (APA) because it involves a foreign affairs function of the United States. 5 U.S.C. 553(a)(1).

Article II of the Constitution endows the President with certain foreign affairs powers, including the power to regulate the entry of noncitizens to the United States. *See* U.S. CONST. art. II; *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty . . . [and] is inherent in the executive power to control the foreign affairs of the nation."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)

("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power . . . ."). An agency action that is taken as an extension of the President's Article II foreign affairs authority is a diplomatic function and falls within the foreign affairs exception (hereafter, the "exception"). See *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 755 (9th Cir. 2018) (noting that Article II "vests power in the President to regulate the entry of aliens into the United States," and are inherent executive powers that constitute a foreign affairs function (citing *Knauff*, 338 U.S. at 542)). Visa functions specifically involve regulating the admission or exclusion of noncitizens. Therefore, visa-related regulations involve executing a constitutionally-bestowed Executive power. See *Knauff*, 338 U.S. at 542. Any visa-related regulations then fall within the exception as an extension of the President's foreign affairs functions.

An action will fall within the foreign affairs exception if it "clearly and directly" involves a foreign affairs function. *Capital Area Immigrants' Rights Coal. v. Trump*, 471 F. Supp. 3d 25, 53 (D.D.C. 2020) ("to be covered by the foreign affairs function exception, a rule must clearly and directly involve activities or actions characteristic to the conduct of international relations"). In *Raoof* v. *Sullivan*, the U.S. District Court for the District of Columbia found that the Department properly exercised the foreign affairs exception for the J-1 nonimmigrant visa two-year foreign residence requirement because the "the exchange visitor program—with its statutory mandate for international interaction through nonimmigrants—certainly relates to foreign affairs and diplomatic duties conferred upon the Secretary of State and the State Department." 315 F. Supp. 3d 34, 44 (D.D.C. 2018). As in *Raoof*, this rule reflects changes to U.S. foreign policy, specifically in the context of U.S. visas. In waiving certain fees for particular visa applicants, this rule will allow the Department to better facilitate immigration of foreign nationals to the United States, which clearly and directly relates to a foreign affairs function of the United States.

Given the Department's responsibility for carrying out U.S. foreign policy, which includes the issuance of visas, and the Department's discretionary authority to collect visa fees,

the Department may exempt categories of foreign nationals from payment of fees for an immigrant visa application. Fees are frequently a central discussion area in bilateral and multilateral consular engagements and have at times become a profound diplomatic irritant. What fees we do or do not charge a given country's citizens will directly affect the fees charged to Americans who wish to visit that country. The Department spends considerable time on this issue, and on ensuring reciprocal treatment for American citizens. Visa fees have a direct diplomatic effect on our relationship with other countries. The Secretary's exercise of a discretionary authority to publicly identify which categories of foreign immigrants are not required to pay immigrant visa application fees, particularly when foreign nationality is a determinant and reciprocal treatment at issue, clearly and directly impact foreign affairs functions of the United states and implicates matters of diplomacy directly. Consequently, in accordance with 5 U.S.C. 553(a)(1), is exempt from the notice and comment requirement of 5 U.S.C. 553.

B. Regulatory Flexibility Act / Executive Order 13272 (Small Business)

As this rulemaking is not subject to notice-and-comment requirements, the Regulatory Flexibility Act does not apply.

C. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UFMA), Pub. L. 104-4, 109 Stat. 48, 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of $100 million or more by State, local, or tribal governments, or by the private section. This rule will not result in any such expenditure, nor will it significantly or uniquely affect small governments.

D. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

The Office of Management and Budget (OMB) has designated this rule a "significant regulatory action," although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by OMB.

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Department has reviewed this proposal to ensure consistency with those requirements.

The Department has also considered this rule in light of Executive Order 13563 and affirms that this rule is consistent with the guidance therein.

E. Executive Orders 12372 and 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government. Nor will the rule have federalism implications warranting the application of Executive Orders 12372 and 13132.

F. Executive Order 12988 (Civil Justice Reform)

The Department has reviewed the rule in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

G. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)

The Department has determined that this rule will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rule.

H. Paperwork Reduction Act

This rule does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

I. Congressional Review Act

This final rule is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 801 et seq.

List of Subjects in 22 CFR Parts 22 and 42

Consular services, Fees, Immigration, Passports and visas.

Accordingly, for the reasons stated in the preamble, and under the authority 8 U.S.C. 1104 and 22 U.S.C. 2651(a), 22 CFR parts 22 and 42 are amended as follows:

PART 22—SCHEDULE OF FEES FOR CONSULAR SERVICES — DEPARTMENT OF STATE AND FOREIGN SERVICE

1. The authority citation for part 22 continues to read as follows:

AUTHORITY: 8 U.S.C. 1101 note, 1153 note, 1157 note, 1183a note, 1184(c)(12), 1201(c), 1351, 1351 note, 1713, 1714, 1714 note; 10 U.S.C. 2602(c); 22 U.S.C. 214, 214 note, 1475e, 2504(h), 2651a, 4206, 4215, 4219, 6551; 31 U.S.C. 9701; E.O. 10718, 22 FR 4632, 3 CFR, 1954-1958 Comp., p. 382; E.O. 11295, 31 FR 10603, 3 CFR, 1966-1970 Comp., p. 570.

2. Section 22.1 is amended in the table by revising Item 32(e) and adding Items 32(f) and 34(a) to read as follows:

§22.1 Schedule of fees.

* * * * *

SCHEDULE OF FEES FOR CONSULAR SERVICES

Item No.	Fee
* * * * * * *	
32. * * *	

(e) Certain adoptee applicants for replacement Immigrant Visas as described in 22 CFR 42.71(b)(2)	NO FEE.
(f) Certain immigrant visa applicants previously refused pursuant to Proclamation 9645 or Proclamation 9983, as described in 22 CFR 42.71(b)(3)	NO FEE.
* * * * * * *	
34. * * *	
(a) Certain immigrant visa applicants previously refused solely pursuant to Proclamation 9645 or Proclamation 9983, as described in 22 CFR 42.71(b)(3)	NO FEE.
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PART 42—VISAS: DOCUMENTATION OF IMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

3. The authority citation for part 42 continues to read as follows:

AUTHORITY: 8 U.S.C. 1104 and 1182; Pub. L. 105-277, 112 Stat. 2681; Pub. L. 108-449, 118 Stat. 3469; The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (done at the Hague, May 29, 1993), S. Treaty Doc. 105-51 (1998), 1870 U.N.T.S. 167 (Reg. No. 31922 (1993)); 42 U.S.C. 14901-14954 (Pub. L. 106-279, 114 Stat. 825); 8 U.S.C. 1101 (Pub. L. 111-287, 124 Stat. 3058); 8 U.S.C. 1154 (Pub. L. 109-162, 119 Stat. 2960); 8 U.S.C. 1201 (Pub. L. 114-70, 129 Stat. 561).

4. Section 42.71 is amended by revising paragraph (b) to read as follows:

§42.71 Authority to issue visas; visa fees.

* * * * *

(b) *Immigrant visa fees*—(1) *Payment of fees*. The Secretary of State prescribes a fee for the processing of immigrant visa applications. Except as provided in paragraphs (b)(2) and (3) of

this section, an individual registered for immigrant visa processing at a post designated for this purpose by the Deputy Assistant Secretary for Visa Services must pay the fee upon being notified that a visa is expected to become available in the near future, and upon being requested to obtain the supporting documentation needed to apply formally for a visa, in accordance with instructions received with such notification. The fee must be paid before an applicant at a post so designated will receive an appointment to appear and make application before a consular officer. Applicants at a post not yet so designated will pay the fee immediately prior to formal application for a visa. A fee collected for the processing of an immigrant visa application is refundable only if the principal officer of a post or the officer in charge of a consular section determines that the application was not adjudicated as a result of action by the U.S. Government over which the alien had no control and for which the alien was not responsible, which precluded the applicant from benefitting from the processing, or as provided in paragraph (b)(2) of this section.

(2) *Waiver or refund of fees for replacement immigrant visas for adoptees.* The consular officer shall waive the application processing fee for a replacement immigrant visa or, upon request, refund such a fee where already paid, if the consular officer is satisfied that the alien, the alien's parent(s), or the alien's representative has established that:

(i) The prior immigrant visa was issued on or after March 27, 2013, to an alien who has been lawfully adopted, or who is coming to the United States to be adopted, by a United States citizen;

(ii) The alien was unable to use the original immigrant visa during the period of its validity as a direct result of extraordinary circumstances, including the denial of an exit permit; and

(iii) The inability to use the visa was attributable to factors beyond the control of the adopting parent or parents and of the alien.

(3) *Exemption from fees for immigrant visa applicants previously refused solelypursuant to Proclamation 9645 or Proclamation 9983*. An immigrant visa applicant shall be exempt from the application processing fee and the affidavit of support review fee, if the applicant was previously

denied an immigrant visa on or between December 8, 2017, and January 19, 2020; the sole ground of ineligibility was based on Proclamation 9645 or 9983; and the applicant is applying again for an immigrant visa. This paragraph (b)(3) provides only for a one-time exemption of the applicable fees per applicant.

5. Section 42.74 is amended by revising paragraph (a) to read as follows:

§42.74 Issuance of new, replacement, or duplicate visas.

(a) *New immigrant visa for a special immigrant under INA 101(a)(27)(A) and (B).* The consular officer may issue a new immigrant visa to a qualified alien entitled to status under INA 101(a)(27)(A) or (B), provided that:

(1) The alien establishes that the original visa has been lost, mutilated, or has expired; or that the alien will be unable to use it during the period of its validity; and

(2) The alien pays anew the application processing fees prescribed in the Schedule of Fees (22 CFR 22.1); and

(3) The consular officer ascertains whether the original issuing office knows of any reason why a new visa should not be issued.

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